United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-2064

To be argued by
KENNETH E. DEMARIO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDERIC D. JENNINGS,

Petitioner-Appellant,

-against-

J. LELAND CASSCLES, Superintendent of Great Meadow Correctional Facility, Comstock, New York,

Respondent-Appellee.

DOCKET NUMBER
77-2064

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P/S

REPLY BRIEF FOR PETITIONER-APPELLANT

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UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ARGUMENT

THE STATE FAILED TO PROVE THAT APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT AGAINST SELF-INCRIMINATION. THE ISSUE OF WAIVER IS A QUESTION OF FEDERAL CONSTITUTIONAL LAW AND THEREFORE REVIEWABLE BY THIS COURT.

Appellee in his brief attempts to equate voluntariness of a confession with voluntariness of the waiver of the right against self-incrimination. Additionally, he urges that this Court is bound by the conclusion of the District Court and the state courts that Jennings' confession was voluntary. This careless use of the concept of voluntariness in mutually exclusive contexts, obfuscates the clear issue in this case.

It is true that appellant does not here argue that his confession was coerced under classical, pre-Miranda voluntariness standards through physical brutality, deprivation of food or sleep, or other such factors. The issue to be decided in this case, however, is whether Jennings' acquiescence in continued interrogation on August 27, after several hours of questioning without warnings the previous day, constituted a knowing and intelligent waiver of his Fifth and Fourteenth Amendment rights against self-incrimination.

In Brewer v. Williams, 97 S.Ct. 1232 (1977), the Supreme Court unequivocally re-affirmed that the question of waiver was "not a question of historical fact, but one which . . .

requires 'application of constitutional principles to the facts as found.'" (Citations omitted). 97 S.Ct. at 1242. The Court emphasized the constitutional requirement that the State bears the heavy burden of proof and that courts indulge in every reasonable presumption against the finding of a waiver. Id.

Appellant has no quarrel with the historical facts as found at the conclusion of the Huntley hearing in state court. But, those facts do not support the conclusion of law that Jennings made a knowing and intelligent waiver of his right to remain silent and his right to counsel. The concededly inadmissible and improperly taken statements of the first day clearly" bolstered the pressures for him to give the second [statement], or at least vitiated any incentive on his part to avoid self-incrimination." Brown v. Illinois, 422 U.S. 590, 605 n.12 (1975). Between the two periods of interrogation, Jennings remained in custody in the same place, without access to his family or counsel. He was unaware that the first day's statements could not be used against him and that the police had exploited the improperly taken statements during the intervening night. Mere recitation of the Miranda warnings at the beginning of the second day's questioning could not adequately apprise Jennings of his situation so that he could make an imformed decision whether to assert his Fifth Amendment rights. Where an initial statement has been taken without advising a prisoner of his rights, it is clear that something more than a belated warning is required to

enable the prisoner to exercise his judgment in a knowing and intelligent manner. Appellee's efforts to characterize the District Court's opinion differently cannot disguise the fact that Judge Costantino relied on nothing but the recitation of Miranda warnings on the second day as a basis for finding the second day's confession admissible.

As noted in appellant's principal brief, courts have varied in the terminology used in their analysis of successive confessions or admissions, sometimes employing "fruit of the poisonous tree" language, see Fisher v. Scafati, 439 F.2d 307 (1st Cir.), vacated on other grounds, 403 U.S. 939 (1971); Harney v. United States, 407 F.2d 586 (5th Cir. 1969), sometimes specifically referring to whether a waiver was knowing and intelligent, see Westover v. United States, 384 U.S. 436, 496 (1966). In all cases, however, analysis has focused on the historical facts concerning such factors as the method, place, and duration of interrogation, the defendant's contacts with or access to family and counsel, any breaks in custody, and the flagrancy of illegal police conduct in determining whether a waiver of Fifth Amendment rights could truly be deemed knowing and intelligent.

The historical facts in the instant case demonstrate that the State showed nothing more than the recitation of Miranda warnings prior to the second day of interrogation. A review of the factors and cases discussed in detail in appellant's principal brief establishes that the State did

not carry it burden of proving that Jennings made a knowing and intelligent waiver of his right against self-incrimination. The confession extracted from him on August 27 should therefore be suppressed.

CONCLUSION

FOR THE REASONS STATED ABOVE, AND IN APPELLANT'S PRINCIPAL BRIEF, THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE WRIT GRANTED.

Respectfully submitted,

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New York, New York
September 30, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH E. DEMARIO, being duly sworn, deposes and says:

I am not a party to the action and am over 18 years of age.

On September 30, 1977, I served two copies of the within Appellant's Reply Brief in the case of FREDERIC D. JENNINGS v. J. LELAND CASSCLES, Docket No. 77-2064 upon the Hon. Louis J. Lefkowitz, Attorney General of the State of New York at 2 World Trade Center, New York, New York 10047, by depositing two true copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Kenneth E. Demario

KENNETH E. DEMARIO

Sworn to before me this
30th day of September, 1977

Helen Bodian

Notary Public

HELEN BODIAN
Notary Public, State of New York
No. 31-4627443
Qualified in New York County
Commission Expires March 30, 1978